The Legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority

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The use of force last year by the North Atlantic Treaty Organisation (NATO) in Serbia as an act of humanitarian intervention to arrest the infliction of atrocities upon the inhabitants of Kosovo, by reason of it occurring in the absence of United Nations' authority, raises the question as to whether such a use of force is legal under international law. This article discusses that question, by firstly noting that prior to the foundation of the United Nations there appeared to be a developing consensus among jurists who recognised a doctrine of humanitarian intervention, and then examining whether that doctrine continues to exist. In fact, despite the attractiveness of the 'legalist' arguments, which would suggest that the doctrine has been subsumed in the United Nations' framework, there do still exist compelling reasons justifying the continued existence of such a doctrine.

INTRODUCTION

On 24 March 1999, for the first time in its 50 year history, the armed forces of the member nations of the North Atlantic Treaty Alliance (NATO) engaged in armed conflict with another state. NATO commenced a series of air strikes flying from bases in Europe and North America on bombing raids to targets within the borders of Serbia, one of the two republics which form the Federal Republic of Yugoslavia (FRY) in its present guise. By way of explaining the reasons for the action, the President of the United States, Bill Clinton, informed the American people:

> We act to protect thousands of innocent people in Kosovo from a mounting military offensive; to diffuse a powder keg at the heart of Europe that has exploded twice in this century with catastrophic results. And we act to stand united with our allies for peace.[1]

That same day, the President advised the United States' Congress in similar terms that the overall objective was to maintain stability in the region and to 'prevent a humanitarian disaster from the ongoing FRY offensive against the people of Kosovo'.[2]

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1 'Statement by the President to the Nation', Office of the Press Secretary, The White House, 24 March 1999, obtained at http://www.pub.whitehouse.gov>.

2 'Text of a letter from the President to the Speaker of the House of Representatives and the President of the Senate', Office of the Press Secretary, The White House, 26 March 1999, obtained at http://www.pub.whitehouse.gov>.

In the context of the last decade the use of force in the Balkans is not unusual. What was once Marshal Tito's Yugoslavia barely survived his death in 1980, and its break up through the separation of such former constituent republics as Croatia and Bosnia-Herzegovina, which has been characterised by the sound of gunfire and a series of human rights atrocities including rape, murder and a general policy of genocide introduced to the world under the obnoxious title 'ethnic cleansing'. The story of Kosovo would appear to be of the same hue, the only difference being that this region in the south of Serbia, although marked by its own distinctive culture of Albanian extraction and despite possessing a degree of autonomy until 1989, was never one of the constituent republics which made up Yugoslavia, but was constitutionally a part of Serbia. At the time the air strikes commenced, a civil war was underway between Kosovan separatists and Yugoslavian armed forces, reports indicating that all the while the civilian population of Kosovo was being subjected to all manner of human rights violations.

Clearly, a paramount position was given to humanitarian intervention as a justification for the use of armed force against Serbia. And yet, as a matter of international law, even before the strikes commenced the Yugoslav Foreign Affairs Minister, Zivadin Jovanovic, reacted to the build-up of NATO forces in neighbouring states and the issuing of NATO ultimatums threatening to use force, questioning the very legitimacy of these acts. Writing to the President of the United Nations' Security Council he stated:

> NATO's threat directly undermines the sovereignty and territorial integrity of the FRY and flagrantly violates the principles enshrined in the UN Charter, particularly in it Article 2, paragraph 4, and it undercuts the very foundations of the international legal order.[3]

Thus the question was raised — if humanitarian intervention is taken to mean the threat or the use of force by one state against another for the purpose of terminating the latter's abuse of its own nationals,[4] is there a rule of international law allowing for this use of force as an act of humanitarian intervention? Indeed, posing the question more specifically, is humanitarian intervention in the absence of United Nations' authority lawful?

In answering these questions, this discussion will proceed in four stages. Firstly, it will determine the existence and acceptance of the doctrine of humanitarian intervention at international law in the era prior to the end of the Second World War and the creation of the United Nations. Following this,

3 'Letter of the Federal Minister of Foreign Affairs to the President of the UN Security Council', Press Statement, 1 February 1999, obtained at http://www.mfa.gov.yu>.

4 This is the definition given to humanitarian intervention by Tom Farer, 'An Inquiry into the Legitimacy of Humanitarian Intervention' in Lori Fisler Damrosch & David Scheffer (eds), *Law and Force in the New International Order* (1991) 185, 185; and this is how the term will be understood in this paper. However, it should be noted that a number of different meanings have also been attached to the term and the 'doctrine' of humanitarian intervention. Specifically, it is often used to cover the situation in which a State violates the territorial sovereignty of another State so as to rescue its own nationals. See Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1629–30. The classic example of such action is Israel's raid on Entebbe Airport in Uganda in 1975 to rescue its own nationals from a hijacked aeroplane parked on the tarmac.

taking the question into the era of the United Nations, the discussion will examine the two significant arguments which have coloured the debate as to whether the pre-war doctrine still survives. That is whether humanitarian intervention can still be undertaken legitimately by a state independently of United Nations' authority. Thus, the second section will examine the arguments of the 'legalists' who base their conception of humanitarian intervention essentially on the provisions of the UN Charter and its prohibition on the use of force. Conversely, the third section will address the argument of the 'realists' who argue for the continuing existence of the doctrine as necessitated through the inadequacies of the United Nations and as evidenced through state practice. Finally, the fourth section will examine how these arguments stand in the light of a series of global developments, including the end of the Cold War and a series of UN authorised actions, which during the 1990s gave rise to what has been termed — sometimes optimistically — the new world order.

THE HISTORICAL PRECEDENT

Historically, how a state treated persons within its own territory was its own business, a matter basic to its sovereignty.[5] However, exceptions to this rule — the antecedents of the doctrine of humanitarian intervention — can be traced back 2000 years, through examples of intervention based on either questions of national or religious solidarity. That is, for example, a foreign government offending a Roman citizen might offend Rome itself and invite retaliation. Similarly, attacking a Christian would be an attack upon Christianity. Hence, in intervening on grounds of religious solidarity, it has been suggested that the Crusades might be considered early examples of humanitarian intervention.[6] More recent examples of such interest in another state's internal affairs include the instances throughout three centuries of European religious wars when Catholic and Protestant princes fought wars between themselves and then negotiated agreements dealing with the treatment of Catholics by Protestant princes, and vice versa, also providing a series of early precedents.[7] However, developing the doctrine beyond intervention merely for the sake of such religious or national solidarity and appealing to notions of common 'humanity' appears to have taken a little longer. The usual starting point in identifying the doctrine in such terms is usually cited from the writings of Hugo Grotius.[8] Writing in 1625 he noted:

> There is also another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries by their ruler. Certainly it is undoubted that ever since civil societies were formed, the

5 Louis Henkin, 'The Internationalisation of Human Rights' (1977) 6 *Proceedings of the General Education Seminar 7*, quoted in Louis Henkin et al (eds), *International Law: Cases and Materials* (1987) 981.

6 Jean Pierre Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter' (1974) 4 *California Western International Law Journal* 203, 205.

7 Henkin, above n 5, 982.

8 Hugo Grotius (1583–1645), Dutch international jurist and scholar.

> ruler of each claimed some especial right over his own subjects ... [But] if a tyrant ... practices atrocities towards his subjects, which no just man can approve, the right of human social connection is not cut off in such case.[9]

It is that 'right of human social connection' upon which it might be said the doctrine of humanitarian intervention grew.

From this time can be indentified a series of interventions based to a lesser or greater degree on such considerations.[10] To illustrate with two of the better known examples, the events which led to the foundation and independence of modern Greece in 1830 erupted from the numerous massacres in previous years committed by the 'Sublime Porte' (the government of the Turkish Ottoman Empire). In response, France, Great Britain and Russia resolved unilaterally to combine their efforts to end the bloodshed, proposing to the Turks a limited autonomy for the region. Upon the Turkish refusal, an armed intervention occurred resulting in a Turkish capitulation and withdrawal from Greece.[11]

A second example again concerns the actions of the Porte, this time in Bulgaria, Bosnia and Herzegovina. In response to another series of Turkish oppressions against Christian populations ('Bulgarian atrocities' as they came to be referred to in the British press), Serbia and Montenegro in 1876 declared war, officially in the cause of 'human solidarity'. The culmination of these actions was the Berlin Conference of 1878 at which the major European powers took a hand in the matter, Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey determining that Turkey would provide limited autonomy for a Christian government in Bulgaria under the Porte, and that Bosnia-Herzegovina would be occupied by Austria.[12] As Disraeli said on his return to London from the Conference of this action enforced on Turkey, it produced a peace, 'but a peace with honour, I hope', the humanitarian element no doubt supplying that quality.[13]

Of course, it would be quite untrue to say that every atrocity committed after Grotius enunciated his rule led to an exercise of humanitarian intervention, and

9 Hugo Grotius, 2 *De Jure Belli est Pacis*, Ch. XXV, 438 (1625, Whewell trans. 1853) quoted in Fonteyne, above n 6, 214.

10 A list of such interventions — described as 'the standard list of precedents' — appears in David Scheffer, 'Toward a Modern Doctrine of Humanitarian Intervention' (1992) 23 *University of Toledo Law Review* 253, 254–5, footnote 4.

11 Fonteyne, above n 6, 207.

12 Ibid 211. This latter example is also significant because it illustrates how — much as today — even in the 19th century the humanitarian cause could appeal to the public and affect the political debate and therefore determine how States might act. Specifically, in this example, it was the extraordinary public debate over the 'Bulgarian atrocities' generated by the English Liberal leader, William Ewart Gladstone, which provided him with a platform on which to stage another of his many political 'come-backs'. See Roy Jenkins, *Gladstone* (1995) Ch 24.
In relation to the formation of international law, the significance of this popular appeal should not be ignored, because although a state's practice may determine what is customary international law, a consideration of domestic concerns will generally determine what will be the practice of that State. Thus, what the populace thought in the 19th century really did count in the law of states, much as it might be argued it still counts today.

13 Benjamin Disraeli quoted in *The Times*, 17 July 1878, That Disraeli's words would later be echoed by Neville Chamberlain on his return from Munich in 1938 during the Sudetenland Crisis further reinforces the 'honourable' associations which are perceived to come from humanitarian causes. The significant differences between these two cases is, however, that Chamberlain was duped. See main text below.

in fact, such intervention was probably the exception rather than the rule. Indeed, some of the examples of cruelties inflicted by states on their own people without any other members of the global community lifting a finger are staggering. A classic example of this is the man made famine and repression of the 1930s perpetrated in the Ukraine by the Soviet Regime under Joseph Stalin, sometimes stated to have resulted in the deaths of anywhere between 4–10 million people.[14] Similarly, it is well known when the Second World War did finally break out, it was not in response to crimes perpetrated by the German authorities against Jews, gypsies and other perceived political enemies of the Nazi regime, but rather in response to the German invasion of Poland.[15]

However, these lapses no matter how deplorable should perhaps be viewed more as illustrations of how the game of *realpolitik* — the game of power politics whereby states act in accordance with their own power and national interest[16] — often placed states in situations in which it was not advantageous to intervene. Presumably, it was usually considered not in a state's interest to become involved in another state's internal affairs. The significant point is that there remain, nevertheless, illustrations evidencing states' acceptance of intervention for humanitarian reasons.

Similarly, another challenge to the validity of the pre-war doctrine might be the argument that it was open to abuse. This allegation cannot be denied. Indeed, there were probably more often than not other considerations which might have led an intervening state to deploy force under the banner of 'humanitarian intervention'. Specifically, with reference to the Balkan examples cited above, despite the clear humanitarian benefits apparent in those cases, it is difficult to view any of the machinations of the Great Powers in that region in the 19th century without also recalling that the Austrians and the Russians were at the same time each seeking to extend their influence over the bones of a decaying Ottoman Empire in that region, each to the detriment of the other.[17] These are examples where the humanitarian consideration might have been one of many. However, even more blatant abuses are also apparent. It is clear that there were also cases where the doctrine was utilised as the slimmest pretext for the exertion of pressure or the deployment of armed force in the pursuit of some other goal, be that goal territorial aggrandisement or merely the pursuit of various other security and political concerns. Probably the most obvious example of this occurred in 1938 when Hitler cited the mistreatment by Czechoslovakia of the German minority living in the Sudetenland

[14] Michael Bazyler, 'Re-examining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia (1987) 23 *Stanford Journal of International Law* 547, 593–4.

[15] Nevertheless, as this example shows, significant humanitarian benefits can arise from wars fought for other purposes. Another example appears in the American Civil War, which broke out not specifically to end slavery, but rather to rebuild the Union of the United States — although slavery had been the issue, which led to secession. The collateral benefit of the Union victory was the abolition of slavery.

[16] Henry Kissinger, *Diplomacy* (1994) 137.

[17] Ibid Ch 5–7.

as a pretext for ultimately annexing the region into what was then a clearly rapidly expanding German state.[18]

However, to abuse a rule, there must be a rule in existence, and on that question up until 1945 there appears to have been near unanimity.[19] Indeed, despite the many failures of states to act and intervene, amongst jurists there appears to have been an optimism that utilisation of the doctrine would increase, an optimism no doubt prompted by further exposure to the extent of humanity's excesses. To quote one commentator writing in 1915:

> As the feeling of general interest in humanity increases, and with it a world-wide desire for something approaching justice and an international solidarity, interventions undertaken in the interests of humanity will also doubtless increase.[20]

THE UN CHARTER AND THE 'LEGALIST', 'CLASSICIST' OR 'CONFLICT MINIMALIST' APPROACH

It is a disappointment that from this appearance of general acceptance of the doctrine of humanitarian intervention, that after the cataclysm that was the Second World War, a split in this near unanimity as to when humanitarian intervention was legitimate should arise through different understandings of the legal effect of the document which was to be the basis of a new order of world security. That document was the UN Charter as opened for signature in San Francisco in 1945, and the provision which has proved so troublesome was Article 2(4), which provides:

[18] As an illustration of how the humanitarian concern evidenced in these early precedents is the same as that evident in the 1990s — and thus relevant to the present discussion — it might be noted the uncanny similarity between the reports emerging in our times from Kosovo and the false allegations made by Hitler against the Czechoslovakian government of Edvard Benes. It has since been revealed that Benes had offered to accept *every* one of the demands made by the leaders of the Sudetenland Nazis in an attempt to avert a German invasion. However, the message Hitler relied upon to motivate international opinion was the following fabrication. As historian Alan Bullock notes, Hitler in negotiations with Chamberlain alleged that the daily number of refugees from the Sudetenland 'had risen from 10,000 to 90,000 to 137,000, and today 214,000', adding that 'whole stretches of country are depopulated, villages burned down, and attempts made to smoke out the Germans.' Alan Bullock *Hitler: A Study in Tyranny* (1962) 462. Similarly, as Berlin based American journalist William Shirer noted in his diary at the time:

> *September 19* ... The Nazi press full of hysterical headlines. All lies. Some examples: WOMEN AND CHILDREN MOWED DOWN BY CZECH ARMOURED CARS, or BLOODY REGIME — NEW CZECH MURDERS OF GERMANS. *The Boersen Zeitung* takes the prize: POISON GAS ATTACK ON AUSSIG? The Hamburg Zeitung is pretty good: EXTORTION, PLUNDERING, SHOOTING — CZECH TERROR IN SUDETEN GERMAN LAND GROWS WORSE FROM DAY TO DAY!". William Shirer, *Berlin Diary* (1941, 1970 edition), 111.

Thus, the activities which prompted invocation of the pre-war doctrine are much the same as those which prompt such actions today. However, some other things do change, and examples such as this also emphasise the importance of the modern electronic media in providing evidence to verify such reports, an availability of such evidence which also goes some way towards exposing such false allegations as those made by Hitler, thereby arguably making at least a small inroad into some abuses of the doctrine.

[19] Michael Bazyler, above n 14, 573; Fonteyne, above n 6, *passim*.

[20] H Hodges, The Doctrine of Intervention (1915) 91, quoted in Fonteyne, above n 6, 223, footnote 70.

> All Members shall refrain in their international relations from the threat or use of any force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[21]

It is essentially the interpretation as to the legal effect of this provision which has split the debate over humanitarian intervention in two. The first approach is a view that the Charter and Article 2(4) are the definitive statements of international law, and that the prohibition on the use of force is unequivocal, allowing for only two express exceptions, the first being acts of self defence,[22] and the second being collective deployments of force under the authority of the UN Security Council in Chapter VII of the Charter. As no similar exception is made in the Charter for unilateral humanitarian intervention, this is an approach which identifies the pre-war doctrine of humanitarian intervention as practised unilaterally or even collectively without United Nations' authority as illegitimate.[23] As an approach based so crucially on this text of the Charter, this approach has been variously described as 'legalist',[24] 'classicist',[25] or — in a manner which better reflects its theoretical consequences — 'conflict minimalist'.[26]

Legalists argue that all use of force whether unilaterally or collectively but without United Nations' authority is illegitimate. A basic starting point for this interpretation is the *Corfu Channel (United Kingdom v. Albania) (Merits)*,[27] which although not concerned directly with humanitarian intervention is one of the premier judicial pronouncements regarding sovereignty and its violation in the post-war world. This case was initiated with a claim for compensation by the United Kingdom for the damage caused by exploding mines to two warships and which killed 44 sailors when passing through the channel. The relevant portion of the channel was in Albanian territorial waters and it was alleged it had been mined either by the Albanians or alternatively with Albanian complicity. On this claim the United Kingdom was successful. However, the case is most significant on account of the question which was

21 *Charter of the United Nations* (1945), reproduced in Louis Henkin et al (eds), *Basic Documents to Supplement International Law: Cases and Materials* (2nd ed, 1987) 99.

22 UN Charter art 51.

23 Extraordinarily, the deployment of force by one state into the territory of another to rescue the nationals of that first state from human rights abuses or imminent risk of death — such as the Israeli raid on Entebbe Airport as noted above n 4 — although only differing from cases of humanitarian intervention as discussed in this paper by reason of the nationality of the rescuees, are considered legitimate because they are considered examples of self defence and not humanitarian intervention. See Schacter, above n 4, 1629–30. That the nationality of the rescuee can make the difference between legality and illegality even though the actual violation of sovereignty will be exactly the same in such cases as these should raise serious questions about the cogency and artificiality of this approach.

24 Anthony Mark Arend, 'International Law and the Recourse to Force: A Shift in Paradigms' (1990) 27 *Stanford Journal of International Law* 1, 19.

25 Tom Farer, 'An Enquiry into the Legitimacy of Humanitarian Intervention', in Lori Fisler Damrosch and David Scheffer (eds), *Law and Force in the New International Order* (1991) 185, 186–7.

26 Byron Burmester, 'On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights, [1994] *Utah Law Review* 269, 276.

27 [1949] I.C.J.R. 4 (*'Corfu Channel Case'*).

then posed as to whether the United Kingdom was entitled under international law to subsequently make the channel safe by then violating Albanian sovereignty and clearing the remaining mines from those territorial waters against the wishes of the Albanian Government. On this question, the Court found in favour of Albania. It stated that it could only regard the United Kingdom's

> alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[28]

As noted above, the *Corfu Channel Case* was not a case dealing with humanitarian intervention, merely with a more general question of intervention *per se*. However, as has been noted elsewhere,[29] by reason of the subsequent application of the rule of this case, it is a favourite and obvious starting point for the argument against intervention of all forms — including humanitarian intervention.

Of course, the *Corfu Channel Case* was decided 50 years ago, and the succeeding decades have seen not merely a series of armed conflicts, but within this general grouping a series of deployments of force which might be described as humanitarian interventions, including the actions of India in Bangladesh in 1971, Tanzania in Uganda in 1978 and Vietnam in Kampuchea commencing in 1979.[30] All would appear to fly in the face of Article 2(4). And yet, rather than simply accept they were illegal, amongst some scholars the reaction has been to raise the question of the 'death' of Article 2(4),[31] these actions in themselves arguably indicating state practices which as a reflection of international law make the prohibition on the use of force no longer the law. However, despite this debate and the substantial passage of time, the 1986 judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*[32] indicated that the court considered the *Corfu Channel Case* rule still applicable, actually basing that decision on a finding that Article 2(4) is itself customary international law, a finding made easier — although as subsequent debate indicates no less contentious — as it was conceded as a 'fundamental principle' by both parties.[33]

However, to suggest that the framers of the UN Charter anticipated a world order in which the cause of human rights would not be supported by the use of

[28] Ibid 35.
[29] Bazyler, above n 14, 575.
[30] These cases are discussed in the text below.
[31] Thomas Frank, 'Who Killed Article 2(4) or Changing the Norms Governing the Use of Force by States' (1970) 64 *American Journal of International Law* 809; Louis Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated' (1971) 65 *American Journal of International Law*, 544.
[32] [1986] I.C.J.R. 14 (*'Nicaragua'*)
[33] Ibid 99.

force would be incorrect. As well as promoting the ideal of state sovereignty, on its face the UN Charter also seeks to promote human rights with prominent references to this goal, including in the preamble a reaffirmation of the member states' 'faith in fundamental human rights',[34] and then in the substance of the UN Charter Article 1(3) identifying as a United Nations goal the 'promoting and encouraging respect for human rights'.[35] In this respect, the document is set up as positive instrument in that cause. Why then can an extensive series of humanitarian interventions authorised by the General Assembly under Chapter VII over the last 50 years not then be cited?

In a recent paper, Frederick Petersen has noted that in the theoretical clash which exists between sovereignty and human rights (ie. to promote the latter means that to some degree the former must be violated), the pivotal question which arises is which of these ideals should prevail.[36] The foregoing discussion has already indicated that a legalist approach sees one pre-war mechanism of human rights protection — that is humanitarian intervention — fall by the wayside. However, with regard to its successor (ie. Chapter VII UN authorised intervention), as a practical matter, Petersen notes that there is really no more than a facade, as the forces by which the United Nations is beset in its decision-making will rarely see it act. To explain:

> Affirmative acts are required to promote human rights. Genocide will not stop and people will not be fed without action. Upholding sovereignty, on the other hand, is automatic. Sovereignty will exist until action is authorised and taken by the Security Council. Inaction guarantees the sanctity of sovereignty. Sovereignty exists until a decision is made to act against it.[37]

Thus, obtaining positive action in the United Nations is always going to be a struggle as this goal is beset by the herculean difficulties which will be faced when seeking agreement from a global community of nations. This will be the case whether consensus is sought from the 189 nations which make up the General Assembly whose influence can be great, or — more importantly — from the 15 which make up the Security Council (that 15 including the permanent 'five' who hold a veto) which has the power to authorise the use of force. Indeed, in any agreement reached an element of self interest which so coloured 19th century *realpolitik* is still a motivating factor, and obtaining agreement in the United Nations specifically to act in the cause of humanity will entail a process whereby each state will be asking how its own interest might be served in encouraging a precedent which will violate sovereignty to encourage human rights, a precedent which might be then applied to any of them.[38]

Add to these two general concepts of practical inaction and the 'dead hand' of self interest the further effect of the Cold War which commenced almost

[34] UN Charter, *Preamble*

[35] UN Charter art 1(3).

[36] Frederick J Petersen, "The Facade of Humanitarian Intervention for Human Rights in a community of Sovereign Nations," (1998) 15 Arizona Journal of International and Comparative Law 871, 881.

[37] Ibid.

[38] Peterson states '[a]decision to intervene by the Security Council is effectively a decision that sovereignty will no longer be protected in that specific set of circumstances'. Ibid.

immediately after the Second World War ended and the obstacles to positive action under the UN Charter in that era appear virtually insurmountable.[39] Because the Cold War saw western and eastern powers blocking the actions of each other in any forum — including the United Nations — for generally no better reason or principle than that such a maneuver might of itself represent some small victory, the weight of the forces arrayed against Chapter VII intervention were apparent.

This, then, is the great flaw in the legalist conception of the international legal order, and how humanitarian intervention can exist within it. Put simply, a use of force is contrary to the UN Charter and is illegitimate, violating Article 2(4), and without United Nations authority humanitarian intervention is an illegitimate use of force. Unfortunately, United Nations authority is virtually never forthcoming. This state of affairs has led to suggestions that there is a 'compelling need' to address the 'deficiencies in law and practice' of the UN Charter.[40] However, the reality is that these deficiencies have not yet been addressed, and it is unlikely that any positive action to address them will be forthcoming in the near future for the basic reason already outlined, the inability to obtain consensus. Accordingly, at present the authority of the United Nations in situations where there might be a valid case for humanitarian intervention, and a legalist basis for legitimate humanitarian intervention, remains elusive.

REALISM AND HUMANITARIAN INTERVENTION WITHOUT THE AUTHORITY OF THE UNITED NATIONS

Despite the difficulties with the legalist conception, there are nevertheless legalists who admit of no other interpretation of existing international law. For example, as one commentator blithely stated of the intervention in Kosovo, '*Indisputably*, the NATO intervention through its bombing campaign violated the United Nations Charter and international law.'[41] And yet, there is some dispute. In contrast to the position of legalists, a number of jurists who are often described as 'realists' continue to recognise the legitimacy of the doctrine of humanitarian intervention as it existed prior to 1945, that is as a use of force embarked upon unilaterally or even collectively but not under the auspices of the United Nations. They can support this position firstly, because without such a doctrine there is practically speaking no alternative mech-anism, and

[39] Indeed, it is frequently noted that during the Cold War the only time these forces were surmounted and the use of force authorised was during the Korean War (1950–1953) when the relevant Security Council resolution was made after the Soviet Union with its right of veto has left the Chamber in protest. Suffice to say, such protests did not occur again.

[40] Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention" ' (1999) 4 *American Journal of International Law* 824, 828.

[41] Jonathan Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 4 *American Journal of International Law* 834, 834 [italics added]. Despite this statement, it is important to note that Charney does explore the possibility of the intervention in Kosovo stimulating the development of a new rule of international law, even if it is to conclude that such a development beyond his legalist conception of adherence to the UN Charter is a matter for future development.

secondly, because the way States behave indicate this is actually customary law.

That there is no alternative is simply a matter of addressing one of those elements of the UN Charter which has been ignored by legalists. Specifically, legalists rarely note that when sovereign nations first signed the Charter in 1945, they were agreeing to a package of terms; not merely terms to renounce the use of force, but also terms outlining how the United Nations would enforce the new order. Under Article 47 a Military Staff Committee would be established, other Articles in Chapter VII indicating how it would organise armed forces put at the disposal of the Security Council. Basically the creation of a 'world army' was being prescribed, and in fact that is how it was endorsed and promoted by politicians at the time.[42] It would appear to have been pivotal to the maintenance of peace, and was probably an inducement for state membership. However, after 50 years none of these military bodies have been established. What is the effect of this failure to follow the Charter's prescription on the use of force at law?

No less an authority than Judge Phillip Jessup noted in 1948 that:

> It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organisation to act with the speed requisite to preserve life. It may take some time before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international actions shall be timely as well as powerful.[43]

Suffice it to say, for 50 years the Security Council has been 'unable' to act, be that because there is still no Military Staff Committee, or for a number of other reasons. Does this mean 'individual measures' survive? Clearly answering in the affirmative, a more recent commentator has summed up the situation as follows:

> [T]he establishment of the machinery for collective security and enforcement was so basic a condition for the Members of the United Nations in surrendering their right under customary international law to use force for a variety of reasons, that failure by the Organisation to create this machinery would partially relieve the Member States of their obligation of restraint under the Charter.[44]

[42] This was one of the many matters specifically addressed by Winston Churchill in his 'Iron Curtain' speech at Fulton, Missouri on 5 March 1946 (ie. 'The United Nations must immediately begin to be equipped with an international armed force . . .'etc). See David Cannadine (ed), *Blood, Sweat and Tears: The Speeches of Winston Churchill* ((1989) 295, 298.

[43] Phillip Jessup, A Modern Law of Nations (1948) 170–1, quoted in Bazyler, above n 14, 579.

[44] Fonteyne, above n 6, 257, footnote 231. Another nicely phrased version of the argument was given by Richard B. Lillich, 'Humanitarian Intervention: a Reply to Dr Brownie and a Plea for Constructive Alternatives', in John Moore, *Law and Civil War in the Modern World* (1974) 229, 247, who noted when commenting on an argument of Richard Falk:

> If, as Falk remarked 'the renunciation of intervention does not substantiate a policy of non-intervention; it involves the development of some form of collective intervention', . . . then concomitantly the failure to develop effective international machinery to facilitate humanitarian intervention arguably permits a state to intervene unilaterally in appropriate situations.

That this is actually accepted by the international community, even if it is not reflected in the debates in the United Nations, is the substance of the realist argument, a view most vehemently articulated by Anthony D'Amato in his criticisms of the *Nicaragua* judgment.[45] Specifically, D'Amato has contended that international law is custom as much — if not more so[46] — than treaties. He has argued that those customary rules of international law are not static, and that although Article 2(4) might have had a major impact on customary international law when adopted in 1945, it did not 'freeze' international law for all time.[47] Where the Court erred, he notes, is that although it appeared to couch its decision in terms of custom and *opinio juris* rather than the Charter alone, the only matters it relied on as evidence of such customary law were such matters as voting patterns on UN resolutions, a rather narrow basis upon which to indicate practice.[48] Essentially, D'Amato argued that the court in finding the law should not merely look at what a state 'says' in its diplomatic encounters; rather it should also look at what it 'does'.

In finding how these two different approaches can yield different results few examples are as illustrative as the Indian intervention in East Pakistan, which led to that region's independence as Bangladesh in 1971. In summary, India invaded in response to the suppression by Pakistan of the Bangladesh independence movement, killing at least one million people, and making another million refugees.[49] In what India 'said', nowhere did it ultimately seek to justify its actions on the basis of humanitarian intervention.[50] It has been suggested that this silence was based on a desire not to undermine a strict interpretation of Article 2(4) which India had adopted previously during theoretical debates in the United Nations. However, what did India actually do? What was its practice? In fact, it embarked on what has been described as one of 'the clearest cases of forceful individual humanitarian intervention in this century'; it sent troops in and stopped the killing.[51] Further, as a reflection of the views of the rest of the world, despite a UN resolution condemning the intervention as a 'violation of Pakistan's territorial sovereignty',[52] no state other than

45 Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 *American Journal of International Law* 101.

46 Initially, it might be presumed that this approach of D'Amato's is based on an understanding of the sources of international law peculiar to the United States, which in its *Restatement (Revised)* 102 clearly makes treaty law subservient to customary law (ie. 'International agreements create law for the states parties thereto and may lead to the creation of customary inter-national law . . .'), whereas in the ICJ statute Article 38 lists convention law ahead of international custom, giving the two at least parity, if not priority to the former. However, when it is further noted that the Court itself appears to have incorporated the effect of the UN Charter into a scheme of custom, the distinction appears less crucial, and in fact of no significance to the Court or of any bearing on its decision. Both documents cited in Henkin, above n 5, 35.

47 D'Amato, op cit n 45, 104.

48 Indicating the conclusion of such reasoning, D'Amato notes, "If voting for a UN resolution means investing it with *opinion juris*, then the latter has no independent content; one may simply apply the UN resolution as it is and mislabel it "customary law"". D'Amato, above n 45, 102.

49 Burmester, above n 26, 286.

50 In fact, India initially argued before the Security Council justifications based on humanitarian intervention, but subsequently had the relevant passages deleted from the published versions of the debates. Bazyler, above n 14, 589, footnote 187. Thus is apparent a very clear case of a state acting and 'thinking' one way, but making certain that officially it says another.

51 Fonteyne, above n 6, 204.

52 Quoted in Bazyler, above n 14, 589.

Pakistan attempted to stop this violation. Suffice to say the Security Council was mute. The global community in its actions accepted the Indian action.

Of course, even realists note that 'humanitarian intervention' can be abused, just as it was abused before 1945. However, the identification of certain common characteristics can assist in determining whether it is more likely than not that an intervention is justified. In an article written in the wake of the 1980s humanitarian disaster caused by famine in Ethiopia, Michael Bazyler identified five criteria which would apply more or less in justifying various humanitarian interventions.[53]

Firstly, before a nation or group of nations takes the 'drastic step' of invading another country, large scale atrocities must have occurred or appear to be imminent, atrocities for which the local government is responsible either by its positive act or by a dereliction of its responsibilities. Thus, it might be said, for example, that just as the executions by the Ugandan Government of Idi Amin of as many as 300,000 Ugandan citizens would have provided this element to justify the subsequent Tanzanian intervention in 1979,[54] so too could the selective distribution of food in Ethiopia which led to mass starvation in 1987 have been described as an atrocity.[55]

Secondly, the state intervening should have an 'overriding humanitarian motive'. This element is probably the most difficult element to establish; Bazyler actually suggests that proving 'purity of motive' is impossible.[56] One of the obvious reasons for this is that often the state in the best position to intervene is usually a near neighbour, which will have other geo-political interests in deploying armed force against a neighbour. For example, even in the Bangladesh case, despite the clear humanitarian benefits of India's intervention, it is almost irrefutable that a collateral benefit for the Indians was the division of its sub-continental competitor Pakistan. Thus, as Bazyler concludes, 'one should not condemn an intervention as non-humanitarian merely because the intervening power also has political, economic or social motives for intervening'.[57] Indeed, to this it might be added that it would seem wrong to condemn such intervention if to do so would be to deny an oppressed people its only remaining rescuer.

Thirdly, a preference for joint action certainly lends weight to a humanitarian intervention. This is the ideal. However, as with the actions of the United Nations, the past has shown that regional organisations and groupings rarely deploy force to prevent massacres, and as a practical matter of protecting potential victims it would seem illogical to expect a state to refrain from intervening merely because it could not do so in a coalition of states. Thus, most of the interventions cited in this discussion have been unilateral. In fact, when seeking legitimacy, it seems the principle benefit of collective action is that it appears to diminish the apparent self-interest of any one state in intervening.[58]

53 Ibid 598–607. Although rearranged, these five criteria are also discussed in Burmester, above n 26, 279–83.
54 Bazyler, above n 14, 590–92.
55 The aim of Bazyler's article was to encourage humanitarian intervention in Ethiopia.
56 Bazyler, above n 14, 601.
57 Ibid 602.
58 Ibid 604.

Fourthly, it is suggested that any military intervention should be proportional and so limited to that required to removing the humanitarian threat and no more. This factor can be assessed in two ways, although neither is without controversy. Firstly, as regards the size of the armed force deployed it should be no larger than necessary. But how large is that? It has been argued that the size of casualties in some military interventions — not necessarily humanitarian — was the result of the intervenors deploying too small an armed force so as not to offend such a criterion, but by reason of the force not being so large as to be overwhelming led to the invaded state's armed forces carrying on the fight longer than was necessary.[59] Similarly, it might be argued that the limited nature of the NATO actions in Kosovo last year, which for more than two months comprised only air strikes, was such that the scale of humanitarian atrocities continued almost totally unchecked — if it didn't actually increase — because the oppressors had not been so comprehensively overwhelmed.[60]

In terms of chronology, what proportionality means is that no intervenor should 'outstay its welcome'. Thus, in 1979 Tanzanian forces were in and out of Uganda in less than four months.[61] In contrast, if the intervention of Vietnam in Kampuchea is considered an act of humanitarian intervention — although the Vietnamese specifically denied this even though they removed a government which had supervised the deaths of a quarter of the country's population — then the fact that the Vietnamese Army remained in Kampuchea for many years after removing the Khmer Rouge regime of Pol Pot might indicate a paramount non humanitarian motivation.[62] However, that said, it is also difficult to ignore the presence of the Khmer Rouge which until recently continued as a substantial irritant in Cambodian affairs. As that presence kept alive the possibility of these oppressors seizing power again, such a matter might also suggest that sometimes humanitarian intervention might well be required over an extended period as a measure of protection.

Finally, Bazyler suggests that the most important criterion should be that prior to deploying armed force, the intervenor should have exhausted all other remedies. These are peaceful alternatives which might cause the abusive government to cease its action, and may include various diplomatic overtures, condemnation before the United Nations, trade embargoes and any other action short of force.[63] However, Bazyler also notes that the past practice of some states might indicate that many of these peaceful alternatives would be ineffective. An abusive government might be totally impervious to international opinion and pressure. Further, the delay caused by pursuing such alternatives

[59] D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny' (1990) 84 *American Journal of International Law* 516, 522. In this article, D'Amato suggests that the invasion of Panama was probably justified on the ground of 'restoring democracy', a basis for legitimacy which he argues can only be accepted with reference to customary international law.

[60] 'The wonder weapons of air power looked futile against primitive 'ethnic cleansers' with guns. The long threatened bombing campaign failed to deter the rape of Kosovo and even appeared to be speeding it.' Johanna McGeary,'The Road to Hell', *Time*, April 12 1999, 24–7.

[61] Bazyler, above n 14, 590.

[62] Ibid 609–10.

[63] Ibid 606–7.

might enlarge the necessity to intervene by inflating any humanitarian disaster. In such cases, these circumstances will tend toward encouraging an immediate use of force.

That these five criteria will not always be applicable to all cases requiring humanitarian intervention has been identified by some commentators as an indication that what have been described as realists in this discussion should be broken down into further groupings. For example, Byron Burmester suggests that 'realists' would not subscribe to such criteria and that those who do should be described as 'conditionalists'.[64] However, as has been made clear, Bazyler in his discussion has identified that the applicability of the five criteria will frequently vary, being subject to the circumstances of each case. Further, when it is noted that one of Burmester's 'realists', Anthony D'Amato, has himself indicated that in certain cases there is a preference for certain of these criteria,[65] the distinction appears less significant. Suffice to say, all of these jurists recognise the legitimacy of humanitarian intervention and the use of force in circumstances beyond the auspices of the United Nations.

A NEW WORLD ORDER OR ANOTHER 'LOST HORIZON'?

As the foregoing discussion has indicated, certainly up to at least 1991 it is fair to say that despite the impressive support legalists could muster from such bodies as the International Court of Justice, there were substantial reasons for supposing that the realist approach held the advantage with its compelling and practical approach which provided a realistic solution to curbing the excesses of large scale human rights abuse. However, the significant events of the last decade, including the end of the Cold War and the United Nations action in the 1991 Gulf War, prompted a number of observations heralding a 'new world order', an order in which the United Nations could be an effective organisation promoting both peace and humanity.[66] It was a view, which if correct would almost certainly have swung the debate in favour of legalism.

That the end of the Cold War coincided with the beginning of a more active United Nations era is evidenced by an increase in the peacekeeping operations which are authorised by Security Council. Whereas between 1948 and 1987, only 13 of these were authorised, it took only another six years to double this figure.[67] Perhaps this was a direct result of attention being diverted from old

[64] Burmester, above n 26, 283–5.

[65] For example, in a way similar to Bazyler, D'Amato notes that collective intervention is always preferable to unilateral intervention, but that a failure to be able to create such coalitions should not disable a legitimate and necessary act of intervention. D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny' (1990) 84 *American Journal of International Law* 516, 519.

[66] See for example, James Walsh, 'Global Beat', Time April 1 1991, 20; Scheffer, above n 10, 253; Boutros Boutros-Ghali, *Report of the Secretary General on an Agenda for Peace — Preventative Diplomacy, Peacemaking and Peacekeeping*, 3 UN Doc S/24111 (1992) reprinted in 31 ILM 953.

[67] David Bills, 'International Human Rights and Humanitarian Intervention: The Ramifications of Reform on the United Nations' Security Council' (1996) 31 *Texas International Law Journal* 107, 110.

animosities. However, it was the United Nations response to the August 1990 Iraqi invasion and annexation of Kuwait that demonstrated a previously unrealised potential when in an unprecedented action the Security Council under Resolution 678 authorised the use of 'all necessary means' to expel the Iraqi armed forces from Kuwait.[68] Commencing on 15 January, the subsequent use of force by a United States led multinational coalition accomplished this task by the end of February.[69] It appeared not merely as a clear and unambiguous example of the use of force consistent with the UN Charter, but also as a more basic example of the United Nations actually intervening, in that case as an act of collective self defence.

As evidence of this New World Order's effect on humanitarian causes, the subsequent actions undertaken by the United Nations in Iraq are often cited. Specifically, pursuant to Resolution 688,[70] 'safe havens' were established in the north and south of the country to protect sections of the Iraqi population fleeing their government's post-war response to internal rebellion. However, as an example of humanitarian intervention *against* another sovereign government, it is perhaps less than ideal. Certainly, there was a humanitarian need for action, estimates indicating that as many as a million refugees were pouring into neighbouring countries to escape their tormentors. And yet, that this action was ultimately accomplished with the consent of the Iraqi government,[71] which having just been defeated in battle by the United Nations was effectively presented with a *fait accompli*, might tend to compromise the example.

Perhaps the intervention in Haiti in 1994 is a better example. By Security Council Resolution 940, the use of 'all necessary means' was authorised to remove a military regime which had deposed a democratically elected government, and a regime which since that time had perpetrated what have been described as 'horrendous' human rights abuses.[72] Suffice to say, upon the United States deploying forces this regime was deposed swiftly and with virtually no violence.[73] However, even this example has been criticised as less than ideal because its primary objective appeared to be the reinstallation of the democratically elected government,[74] which is precisely what the Security Council Resolution called for.

And yet, despite these concerns, it can be seen that commencing with the actions taken over Iraq a great deal of momentum was given to a United Nations centric perspective on the use of force for any purpose. As the Secretary General of the United Nations, Boutros Boutros-Ghali stated in 1992:

68 SC Res 678 (1990) 29 November 1990, reproduced in *The United Nations and the Iraq — Kuwait Conflict, 1990–1996*, United Nations Blue Book (1996), 178.

69 Ibid 25–8, 'Introduction'.

70 SC Res 688 (1991), 5 April 1991. Ibid 199.

71 Memoranda of Understanding in S/22513, 22 April 1991, Ibid, 209 and S/22663, 31 May 1991. Ibid 259.

72 Petersen, above n 36, 893–4.

73 Ibid

74 Ruth Gordon, 'Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti' (1996) 31 *Texas Journal of International Law* 43, 52.

> In these past months, a conviction has grown, among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter — a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, *in the words of the Charter*, 'social progress and better standards of life in larger freedom'.[75]

Unfortunately, with the benefit of hindsight it can be said that these comments were made at a time when United Nations prestige, based largely on its activities and apparent success in Iraq, was at a peak. Subsequent failures and inaction would indicate that the implications drawn from those successes were merely a legalist aberration.

The first realisation of this might be identified in the withdrawal of United States forces from an anarchic Somalia in 1993. Authorised by the Security Council to 'use all necessary means to establish a secure environment for humanitarian relief',[76] the American mission first met with success where previous United Nations forces had failed.[77] Indeed, it has been suggested that it contributed to the saving of some half a million people who were being denied supplies. However, when after a year the American forces became themselves the subject of the local war lords' aggression — one battle resulting in the deaths of 18 soldiers — the order was given to pull out. No doubt, the effect of the American people viewing images of dead American servicemen being dragged around the dusty streets of Mogadishu on the evening news played some part in this decision, and provides a timely reminder as to how domestic matters will still determine where and when intervention will occur. As for the Somalis, since that time, with no further United Nations presence in their country, although the immediate threat of starvation was dispelled, it still looms large. In addition, there is still no semblance of order in the country.[78] In these respects, the operation was a failure, and in that context no doubt coloured the determinations of those states which contributed to it and their enthusiasm to authorise or partake in similar future operations.

As a further step down the track away from the new order, the Security Council's total inertia beyond debate in response to the events in the African republic of Rwanda in April 1994 represented the more familiar face of the United Nations. Triggered by the death in a plane crash on 6 April of the Rwandan President, a wave of brutal and massive killing commenced, brutal in that the killers generally hacked their victims to death with machetes, axes, cudgels and iron bars.[79] The killings were ostensibly perpetrated as acts of tribal warfare by the majority Hutu upon their compatriot Tutsis, but in fact were also visited upon moderates and, it seems, anyone else who got in the way, including UN Peacekeepers who were supervising a cease fire in the local

[75] Boutros-Ghali, above n 66, 956, quoted in Bills, above n 67, 108.

[76] SC Res 794 quoted in Petersen, above n 36, 890.

[77] A contingent of 500 Pakistani troops had arrived in Somalia in September 1992 having been advised that the two principal warring parties had agreed to allow the unloading and escorting of food shipments in Mogidishu. However, despite this agreement, the Pakistanis still met resistance. Ibid 889.

[78] Ibid 890.

[79] Boutros Boutros-Ghali, 'Introduction' in *The United Nations and Rwanda 1993–1996*, United Nations Blue Book (1996) 44.

civil war.[80] By the end of April, it was estimated that as many as 200,000 people had been killed.[81] In the next few months this figure would grow to as many as one million out of a total national population of 7.5 million, with another two million Rwandans pouring into refugee camps situated in Rwanda's equally poor neighbours.[82]

Regrettably, despite the United Nations having received intelligence prior to the outbreak of violence indicating what was about to occur, no action was taken.[83] Regrettably, despite being made aware of the killings almost as soon as they commenced, no intervention was authorised. Indeed, not until mid-May did the Security Council adopt a resolution authorising an expanded peacekeeping force to be assembled to provide security for displaced persons and refugees.[84] Even then the delay was such that, prompted by France, a further resolution had to be adopted in June authorising individual states to intervene pending the arrival of the peacekeeping force.[85] Suffice to say, by this time French troops were already on site commencing operations.[86]

Indeed, in reviewing the Rwandan catastrophe, it is regrettable that at a time when the United Nations *appeared to* be asserting itself, it so totally failed to meet the challenge promised by the Gulf interventions. But then, over the same period, has not the United Nations also failed to act in other places where atrocities continue unabated, such as East Timor or Tibet?[87]

In hindsight it must be asked what actually made intervention in the Gulf possible? Had the plan of 1945, and the prescription of the UN Charter finally been administered? In fact, the answer is 'no'. There still is no world army, and the United Nations is still dependent on the various interests of its most powerful members. Rather, what the world witnessed in 1991 was the legalist *illusion* of a comprehensive system. But what actually occurred, was that for a brief moment a series of global resentments and animosities were neutralised and a series of interests — with a little encouragement[88] — converged.

80 Ibid 38.

81 Ibid 44.

82 Ibid 4.

83 More recently in justifying a Tutsi led Rwandan security intervention into neighbouring Zaire, the Rwandan Vice President General Paul Kagame noted: 'We were not going to make the same mistake twice. Our first big mistake was to give the UN information on how a genocide was being planned in 1994 and think that they would act on it.' Quoted in 'Why Rwanda admitted its role in Zaire, *The Mail and Guardian*, August 8 1997, obtained via http://www.africanews.org/specials/glakes/rwanda_zaire.html (accessed April 1999). That such information was passed on to the United Nations has been confirmed by members of the UN Peacekeeping forces in interviews on both radio (See 'The UN and Rwanda, *Background Briefing*, ABC Radio, February 21 1999, transcript available via http://www.abc.net.au/rn/talks/bbing/stories/s19237.htm, and television ('When Good Men Do Nothing', *Panorama*, BBC Television, broadcast on *Four Corners* March 1 1999, ABC Television).

84 SC Res 918, 13 May 1994, reproduced in *The United Nations in Rwanda*, above n 78, 282.

85 SC Res 929 (1994), 22 June 1994. Ibid 308.

86 Ibid 120–1.

87 For a brief but disturbing account of atrocities committed in these countries, see Petersen, above n 34, 898–901.

88 Apparently, in securing Security Council votes leading to the adoption of Resolution 678, the lobbying between states became sometimes a very basic matter of dollars and cents. Yemen, for example, in siding with Iraq and voting against the resolution sacrificed US$70 million dollars in US foreign aid. E Sciolino, *The Outlaw State: Saddam Hussein's Quest for Power and the Gulf Crisis* (1991) 238, cited in Paul Kallenbach, 'Legalists, Realists and Humanitarian Intervention in the Aftermath of the Gulf Conflict', Unpublished paper, University of British Columbia, 1993.

However, exposing the illusion, the Somalian experience demonstrated how flawed the system is when national interests wane. And as for Rwanda, it demonstrated the continuing impotence of the United Nations, and is as strong a justification as any for unilateral humanitarian intervention or any other form of humanitarian intervention as was outlined by Judge Jessup 50 years ago.

So what actually produced the intervention in Iraq? To quote no less an authority on *realpolitik* in the modern world than former United States Secretary of State, Henry Kissinger, that moment which produced United Nations action was itself produced by probably no more than 'an almost accidental combination of circumstances unlikely to be repeated in the future'.[89]

CONCLUSION

Evaluating the preceding arguments tends to indicate that humanitarian intervention undertaken even without the authority of the United Nations is justified, and should be judged as legal and legitimate. Of course, this denies the correctness of the legalist argument. But then, doesn't the legalist argument deny a series of realities, including the evidence of state practice and its effect on customary international law? Doesn't the legalist argument itself ignore some of the very aims of the UN Charter and the failure of these aims to be realised, and the effect of this on interpretations of the Charter and on international law generally?

The rejection of the legalist argument is, of course, but one opinion, and as the official pronouncements over the NATO air strikes in Kosovo last year have indicated, the issue is still being debated furiously. Indeed, it is striking how perfectly both legalist and realist arguments emerged from the protagonists. On the one hand the NATO realists gave priority to humanitarian concerns, while on the other legalist arguments advanced on behalf of the Yugoslavian Government immediately cited concerns over sovereignty, territorial integrity and violations of Article 2(4).[90] Suffice to say, as reported in the Australian media, while the NATO reports dwelt on the plight of some 1.5 million Kosovans fleeing their Serbian tormentors, the Yugoslav statements in contrast dealt with these same people in ways ranging from the dismissive to the preposterous.[91] An emphasis of such matters was not compatible with a legalist argument.

If the legalist approach was embraced, the NATO intervention could not survive questions about its legitimacy. Although the case of intervention had

[89] Quoted in James Walsh, 'Global Beat', *Time* April 1 1991 20, 24.

[90] See Introduction above.

[91] Yugoslav comments regarding Kosovar civilian populations as reported in the Australian media included allegations that the hundreds of thousands of refugees who had fled the region were actually fleeing the "brutal NATO operations" and not an increased wave of genocide: 'Exodus from Kosovo', *The Age* 30 March 1999; and most extraordinarily, that in fact these people were not Kosovars but actually Albanian actors working for the equivalent of A$8 per day for the benefit NATO and the world's media! Candice Hughes, 'Refugees are actors, says Yugoslav minister', *The Age* 12 May 1999.

many claims to legitimacy under a realist argument, the significant feature the intervention lacked was the authorisation granted by a Security Council resolution. And yet, the claims to legitimacy of such an intervention under a realist argument are substantial and difficult to ignore. They include the following factors: firstly, the extent of the humanitarian abuses, which had been frequently reported as a policy of genocide;[92] secondly, the exhaustive negotiations which had been conducted without success in the preceding month (February, 1999) in Rambouillet, France between Kosovors and Serbians under NATO patronage;[93] and thirdly, the limited nature of the intervention, which in so far as it only comprised air strikes — a measure which was possibly motivated by a political desire not to deploy ground troops and therefore sustain commensurate casualties — was indicative of a reluctance to achieve goals beyond the humanitarian objective. Finally, perhaps the most compelling feature of this intervention was that which has been lacking in most of the other interventions cited in this discussion. That is, its' collective nature, the air strikes in Kosovo being the result of the combined efforts of the nineteen member states of NATO.[94]

These are all significant matters, and should be stacked against the arguments of legalism. Indeed, perhaps their effect on those arguments can already be perceived. Something which is interesting to note is that in the aftermath of the Kosovo intervention some jurists who have expressed the view that the intervention was illegal because it was in breach of the UN Charter — thereby suggesting a legalist viewpoint — have nevertheless gone on to suggest that it could form the basis of a new rule of international law. This view is based essentially on the belief that the use of force was warranted, or 'ethical' as one commentator phrases it,[95] and in the absence of Security Council authorisation,

92 While a complete picture of atrocities is still to emerge, the characteristic news reports throughout the months of late March, April, May and June 1999 comprise repeated accounts of abduction, rape, torture and murder perpetrated by Yugoslav Army personnel, para-military personnel, and the police. See *The Age*, *passim*. No doubt such crimes as these were facilitated by the systematic, street-by-street, herding together and forced expulsion of the Kosovar-Albanian population of Pristina, the principle city of Kosova (as documented on the ABC TV program *Four Corners*, Monday 3 May 1999), an event of a kind not seen in Europe since the Second World War.

93 These talks were actually the culmination of the application of pressure which had been applied to the parties by the United Nations, the Council of Europe and NATO over the previous twelve months (see SC Res 1203 (1998) 24 October 1998, obtained via http://www.un.org), pressure which had been heightened in response to a growing number of reports of massacres of Kosovars during that time: Cameron Stewart, 'Conflict born of calculated brutality', *The Weekend Australian*, 10–11 April 1999, 33. Despite reaching an apparent impasse a week before the intervention commenced, and although it did not grant them the independence they sought, the Kosovars suddenly agreed to sign the latest version of a peace document, an act which then prompted the Serbians to walk out of the talks. Johanna McGeary, 'Ready to Rumble Again', *Time*, March 29 1999.

94 Whether these arguments are entirely conclusive under a realist conception, however, is a further matter raised by Richard A. Falk, 'Kosovo, World Order, and the Future of International Law' (1999) 93 *American Journal of International Law* 847. Falk (above n 43), having already adopted a realist conception of the doctrine of humanitarian intervention provides a valuable reminder that there are a number of ways of viewing any act of intervention, even under the realist conception.

95 Antonio Cassese, 'Ex iniuria oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', (1999) 10 *European Journal of International Law* 23, 25.

that such a use of force should constitute an exception to the UN Charter system.[96] In other words, although illegal in itself, the effect of the NATO intervention in Kosovo because it was warranted might be a stepping stone on the path towards the 'crystallisation' of a general rule of international law because it is evidence of state practice.[97] Of course, this view is expressed to be subject to certain qualifications regarding when the exception can be invoked, qualifications which it should be noted can be easily reconciled with variations of the five criteria of Michael Bazyler discussed above. This observation alone raises the question as to why Kosovo should mark the inception of such an exception to legalist orthodoxy, as opposed to the Bangladesh intervention or any of the other interventions discussed above, a matter which is not immediately discussed by these jurists. Nevertheless, the development is significant. As Ruth Wedgwood has noted in a way representative of this group:

> The war in Kosovo may mark the end of Security Council classicism — the common belief that all necessary and legitimate uses of force outside the Council's decision can necessarily be accommodated within the paradigm of interstate self-defence. It may also mark the emergence of a limited and conditional right of humanitarian intervention, permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world would recognise as a responsible multilateral organisation and the Security Council does not oppose the action.[98]

Thus, by such evidence can be observed an incursion on the legalist conception of the use of force by a single example of humanitarian intervention, which would appear to be justified by realist arguments.

However, perhaps of more significance in supporting the cause of humanitarian intervention and particularly the intervention in Kosovo is the point that one of the pivotal arguments of legalism is based on the jurisprudence of the International Court of Justice. It should be recalled that in reviewing the decisions of this Court, no case ever involved either an over riding humanitarian objective of this kind, or a collective deployment of such force. Thus, it can be

[96] When discussing questions of humanitarian intervention, it is the practice of most jurists to attempt to avoid arguing in terms of 'morals' or 'ethics', presumably because of the subjective baggage these concepts necessarily introduce. However, as Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', (1999) 10 *European Journal of International Law* 679, 711 has argued, the arguments for intervention are necessarily based around a process of identification with the interveners, continuing that this 'spell' might be broken if lawyers remember that stories of intervention and their characters are the product of 'imaginative processes and of struggles for meaning', the recognition of which can lead to a more critical analysis of international law.

[97] Cassese, above n 95, 25.

[98] Ruth Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 *American Journal of International Law* 828, 828. In contrast to the position of Cassese and Wedgwood, the position of Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1, should also be noted. Simma appears to take the legalist position that the use of force by NATO was illegal, but that it can be countenanced on the basis of its exceptional and necessary nature. It might be further observed that Simma specifically sets out that such a use of force could never be justified as a general policy. This position perhaps should be contrasted with the basis upon which the present paper has suggested the doctrine of humanitarian intervention should be understood. That is, as something which is exceptional.

said that there is at present no authoritative decision regarding the status of the doctrine of humanitarian intervention. Add to this existing judicial silence the thoughts of the various scholars noted in this discussion — whose views in international law are recognised as a valid source of that law[99] — and it is quite possible that despite past indications a future court might embrace the doctrine of humanitarian intervention.

Of course, the answer to this question may be soon upon us, for soon after the commencement of the NATO action the Yugoslav Government initiated a suit against ten NATO members in the International Court of Justice, alleging the illegality of the NATO intervention. This claim, which is still proceeding, is surprisingly based not only on the violation of Yugoslav sovereignty, but also — in something of a juxtaposition of the NATO position — allegations that the strikes constitute the crime of genocide in their effect on the people of Yugoslavia.[100]

Whether the action is ultimately contested on the merits is yet to be seen. Already, two of the defendants, Spain and the United States, have been removed from the list on the basis of the Court's lack of jurisdiction over them.[101] However, as at the time of writing the remaining eight still remain to argue the case, and if so argue it, the issue of humanitarian intervention almost certainly will be placed squarely before the court. One way or the other, the Court will be called upon to decide whether international law will condemn those members of the international community who refuse to turn a deaf ear to the cries of oppressed peoples around the world, or whether it is actually a tool assisting in the protection of the global community of peoples, nations and states. Perhaps the court will adopt a legalist view. However, the cause of human rights is great and its apostles loud.

Suffice to say, regardless of the finding it is unlikely that it will inhibit the initiative of states when they have sufficient motivation. For as Sir Hartley Shawcross stated when he outlined the case against the major German War Criminals at Nuremberg in 1945:

99 Note that the *Statute of the International Court of Justice*, art 38(1) identifies the sources of law as international conventions, international custom, and "judicial decisions and the teachings of the most highly qualified publicists of the various nations". Quoted in Henkin, above n 3, 35–6.

100 *The Age* 11 May 1999.

101 On 2 June 1999, upon hearing an application for provisional measures brought by Yugoslavia seeking that the Defendants cease their acts of force immediately, the International Court of Justice ruled that it lacked jurisdiction with regard to the cases brought against two of the Defendants (Spain and the United States) and had them removed from its list. With regard to the remaining eight cases, it ruled that it lacked *prima facie* jurisdiction, a pre-requisite for the granting of provisional measures. A fuller consideration of the jurisdictional question was deferred to a later date. Information obtained via http://www.icj-cij.org.

> The rights of humanitarian intervention on behalf of the rights of man, trampled upon by a state in a manner shocking the sense of mankind, has long been considered to form part of the recognised law of nations.[102]

To this statement it might simply be added that if an effective legal system is understood as a characteristic of a civilisation and of a civilised world, then the doctrine of humanitarian intervention must continue to exist in support of all those states which genuinely seek to do good and invoke it; for in any other case, our global community might as well cease in its aspirations to describe itself in these terms.

[102] *Trial of the Major War Criminals Before the International Military Tribunal*, (1947–1949),Vol 3, 92 (Tuesday, 4 December 1945); also available via http://www.yale.edu/lawweb/avalon/imt/proc/12-04-45.htm. cf. Version quoted by Fonteyne, op cit n 6, 226:

> The right of humanitarian intervention, in the name of the Rights of Man trampled upon by the State in a manner offensive to the feeling of Humanity, has been recognised long ago as an integral part of the Law of Nations.

Unfortunately, although this version has more punch, it is actually an English translation of a French translation of the English Shawcross spoke, which is quoted above.